

Noor Chand Sheikh

Vs

The State of West Bengal

Writ Petition No. 29 of 1974

(A . C. Gupta, R. S. Sarkaria JJ)

04.10.1974

JUDGMENT

GUPTA, J. -

1. In this petition under Article 32 of the Constitution, the petitioner questions the validity of his detention under the Maintenance of Internal Security Act, 1971. He was arrested on July 14, 1972 on the strength of an order made on the previous day by the District Magistrate, Malda, West Bengal, in exercise of the power conferred by sub-section (1) read with sub-section (2) of Section 3 of the said Act. The order directing the petitioner to be detained said that the district Magistrate, Malda, was satisfied that it was necessary so to do with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community. The grounds of detention served on the petitioner mention the following particulars which apparently satisfied the detaining authority that it was necessary to take the petitioner into preventive custody :

1. On July 2, 1972 at about 20.46 hrs. you and your 50/60 associates twisted the signal wire of Jamirghata Up outer signal by pushing wooden sticks and tying by iron wire. As a result Goods Train No. D.C. 132 Up detained beyond Up outer signal of Jamirghata Rly. Station. You and your associates then broke open the door of the wagon No. SEC. 47865 and Wagon No. HRC 12872. You looted raw coals from the above noted wagons and opened K. C. Wagon NRKC. 80027, ERKC. 82923 and WRKC. 50160. RPF personal stationed at Jamirghata Rly. Station hastened to the spot and chased you and your associates. You and your associates attacked RPF personnel with deadly weapons and pelted stone chips aiming at the RPF personnel. On self defence SRK/AW Bhagwan Singh was compelled to fire two rounds from his rifle. Due to firing one of your associates named Jajal Sk. of Satargachi P. S. Kaliachak. District Malda, received bullet injury and died instantaneously, another associate named Abdul Latif of Satargachi also sustained bullet injury who is under treatment in Sadar Hospital Malda. You and your rest associates managed to flee away from the place of occurrence leaving behind about 40 mds. of raw coal at the place of occurrence. You have, therefore, acted in a manner prejudicial to the maintenance of supplies and services essential to the community.

2. On July 4, 1972 at about 22.30 hrs. you and your two associates named Sazzat Sk. and Srish Chandra Mondal made an attempt to break open the door of Wagon No. NRC 56789 loaded with wheat, by wagon breaking instrument, which was stabled in the yard of Bhaluka Road Rly. Station. The on duty RPF personnel stationed at Bhaluka Road Rly. Station managed to arrest you and your two associates red-handed. One special wagon breaking instrument was found in your possession and one two-celled torch light found in possession of your associate Sazzat Sk. You have, therefore, acted in a manner prejudicial to the maintenance of supplies and services essential to the

community.

2. In the petition the petitioner has denied the allegations against him. He states in paragraph 3 of the petition that the Malda police arrested him on some criminal charge and produced him before the Sub-divisional Judicial Magistrate, Malda, but as the local police failed to produce any material or witness against him, he was discharged and that the detention order is based on the same allegations. He submits that the detaining authority had acted "mechanically" and had not considered the "merit of the case".

3. The affidavit-in-opposition filed on behalf of the respondent, State of West Bengal, in answer to the rule nisi issued on the petition, has been affirmed not by the District Magistrate, Malda, on whose satisfaction the order of detention was based but by the deputy Secretary, Home (Special) Department, Government of West Bengal. It is stated that the District Magistrate was "not available for affirming the affidavit" as he was "very busy and preoccupied with maintenance of law and order situation" in the district of Malda. With reference to what the petitioner has said in paragraph 3 of the petition, it is stated in paragraph 6 of the affidavit-in-opposition that in respect of the two incidents mentioned in the grounds of detention, two criminal cases were started in the Court of the Sub-divisional Judicial Magistrate, Malda, on July 3 and July 6, 1972 under Section 147/461/379 and Section 461/511 respectively of the Indian Penal Code and that the "investigating officer who was in charge of the matter" had informed the deponent that "as no person was willing to give evidence against the petitioner in open court, the petitioner was discharged from the said cases".

4. It now seems established on a series of decisions of this Court that the jurisdiction to make orders for preventive detention is different from that of criminal courts seeking to punish the accused for an offence; one depending on the subjective satisfaction of the detaining authority and the other on proof beyond reasonable doubt, and that unsuccessful judicial trial or proceeding would not operate as a bar to a detention order or make it mala fide. The incidents which formed the subject-matter of the two criminal cases against the petitioner also constitute the basis of the order of detention. The fact that the petitioner was discharged from the criminal cases does not necessarily prove his innocence but it certainly does not indicate that he was involved in the incidents described in the grounds of detention. The statement in the affidavit-in-opposition that the petitioner was discharged because none was willing to give evidence against him in open court is based on information given by the investigating officer to the Deputy secretary who affirmed the affidavit. But the deputy secretary is not the detaining authority. The District Magistrate on whose subjective satisfaction the detention order was made does not come forward to say that he had also received similar information from the investigating officer which he believed to be true or that he had other material to convince him that the petitioner was discharged because witnesses were afraid to give evidence against him. In the petition the petitioner has suggested that witnesses were not available because there was no material against him. Counsel for the petitioner pointed out that in the incidents of July 2 and 3, 1972, described in the grounds of detention, the petitioner and his associates are said to have come into clash with the members of the Railway Protection Force and on July 3 the "on duty RPF personnel", it is alleged, "managed to arrest" the petitioner and two of his associates "red-handed"; it was submitted that it was difficult to believe that the members of the Railway Protection Force would be afraid to give evidence against the petitioner, and that the detention order in this case was passed "mechanically" and was a colourable exercise of the power conferred by the Act.

5. We do not think it can be said that the fact that the petitioner was discharged from the criminal cases is entirely irrelevant and of no significance; it is a circumstance which the detaining authority cannot altogether disregard. In the case of *Bhutnath Mete v. State of W. B.* ((1974) 1 SCC 645 :

1974 SCC (Cri) 300) this Court observed :

.... detention power cannot be quietly used to subvert, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse.

If, as the petitioner has asserted, he was discharged because there was no material against him and not because witnesses were afraid to give evidence against him, there would be apparently no rational basis for the subjective satisfaction of the detaining authority. It is for the detaining authority to say that in spite of the discharge he was satisfied, on some valid material, about the petitioner's complicity in the criminal acts which constitute the basis of the detention order. But, as stated already, the District Magistrate, Malda, who passed the order in this case has not affirmed the affidavit that has been filed on behalf of the State.

6. Of course there cannot be a universal rule that the detaining authority must swear the affidavit in every case. This would depend on the circumstances of each case. Referring to "the failure to furnish the counter-affidavit of the Magistrate who passed the order of detention", it was observed in *Shaik Hanif v. State of W. B.* ((1974) 1 SCC 637, 642 (Para 9) : 1974 SCC (Cri) 292, 297), that in cases

Where mala fides or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of a serious infirmity, leading the court to declare the detention illegal.

We have referred to the statement in the affidavit-in-opposition seeking to explain why the District Magistrate could not affirm the affidavit. Apart from the question whether the explanation is satisfactory, the fact remains that in this case there is nothing to show that there was any rational material for the subjective satisfaction of the authority who passed the order of detention. Therefore, we find it difficult in the circumstances of this case to reject the contention that the order of detention was passed mechanically and was a colourable exercise of the power conferred by the Act.

7. Accordingly, we allow the petition and direct that the petitioner be set at liberty.

</html